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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. ——537

ALBERT B. SNYDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Albert B. Snyder, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the Central District of California convicting petitioner of violation of Section 401, Title 18, United States Code (Contempt of Court) and Section 1621, Title 18, United States Code (Perjury).

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (# 4865) has not yet been reported and is affixed hereto as Appendix.

JURISDICTION

The date of the judgment sought to be reviewed is June 11, 1970. On July 13, 1970 an extension of time to file this petition was granted to and including August 10, 1970.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1254, Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court for the Central District of California and the Court of Appeals erred in refusing to suppress evidence obtained from petitioner by force or coercion in violation of his Fifth Amendment privilege against self-incrimination.

2. Whether the District Court for the Central District of California and the Court

of Appeals erred in refusing to dismiss the contempt charge, for the refusal to testify was based upon advice of counsel.

STATUTES INVOLVED

18 United States Code, Sections 401 and 1621, read as follows:

> "§401. Power of court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.
>
> "§1621. Perjury generally. Whoever, having taken an oath before a competent tribunal, officer, or

person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub. L. 88-619, §1, 78 Stat. 995."

"Amendment V to the United States Constitution in its applicable portion reads as follows:

"No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner was sentenced to the custody of the Attorney General or his authorized representative for a period of six months for contempt of court for his failure to respond to a valid court order. The court ordered petitioner to testify after immunity had been granted him. Also, petitioner was sentenced on eight counts of perjury, each count receiving a four year sentence, the sentences to run concurrently, although consecutively to the contempt sentence.

The facts which are material to the consideration of the questions presented follow. The citation references are to Reporter's Transcript (R. T.) and Clerk's Transcript on Appeal to the United States Court of Appeals for the Ninth Circuit (C. T.).

On September 14, 1967, petitioner was called to testify before the Federal Grand Jury investigating alleged card cheating at the Friars' Club in Los Angeles (R. T. 54-55). The testimony he gave was perjured. After petitioner testified, Assistant United States Attorney David Nissen contacted petitioner's attorney, Bruce Hochman. Nissen stated that petitioner had lied to the Grand Jury. Thereafter petitioner and his attorney met several times with Nissen and F. B. I. agents, specifically on October 11, 1967 (R. T. 178). An informal agreement had been worked out, whereby

petitioner agreed to testify as a government witness and the government, in turn, would not prosecute petitioner for perjury.

On October 12, 1967, petitioner again appeared before the Federal Grand Jury. His testimony at this hearing differed in its entirety from his preceeding testimony. Thereafter, petitioner was expected to appear as a witness in the upcoming "Friars Club cases." However in the case of U.S. v. Friedmen 1968, No. 1432 - Criminal, petitioner refused to testify, invoking the privilege against self-incrimination and stating this refusal was given upon advice of counsel.

An order granting petitioner immunity under Section 409(1), Title 47, United States Code, was signed by the court. Petitioner still refused to testify, again invoking his privilege against self-incrimination. At this point he was incarcerated on a charge of civil contempt, remaining imprisoned for the duration of the trial.

Upon petitioner's release, he was charged in the present case with criminal contempt, for refusing to obey a valid court order, and nine counts of perjury, all of which occured during his September 14, 1967 testimony before the Grand Jury.

The basis for federal jurisdiction in the case of first instance was Section 3231,

Title 18. United States Code.

REASONS FOR GRANTING THE WRIT

1. Any Use of Force or Coercion by the Government in Obtaining Evidence Will Render that Evidence Inadmissible if Such Force Violates a Fundamental Constitutional Right.

The decision of the Court of Appeals is in conflict with applicable decisions of this Honorable Court. The Court of Appeals has failed to apply the standards regulating the use of evidence obtained through the use of coercion or force as set forth in Malloy v. Hogan, 1967, 378 U.S. 1; Marchetti v. U.S., 1967, 390 U.S. 39; Grosso v. U.S., 1967, 390 U.S. 62; and Haynes v. U.S., 1967, 390 U.S. 85.

In the instant case petitioner conceeds that his testimony before the Federal Grand Jury on September 14, 1967 constituted perjury under Section 1621, Title 18, United States Code, and Dolan v. U.S., 8th Cir., 1955, 218 F. 2d 454. At the conclusion of his testimony the government had the right and the power to prosecute for perjury.

However, once perjury has been committed, the burden of proof is on the government to show by "clear, convincing and direct evidence to moral certainty and beyond a reasonable doubt that defendant knowingly and intentionally swore to a falsehood." Van Liew v. U.S., 5th Cir. 1963, 321 F. 2d 674, 679; Stassi v. U.S., 5th Cir., 1968, 401 F. 2d 259.

In the instant case, the major portion of the evidence used to convict petitioner of perjury consisted of his subsequent Grand Jury testimony. Although the court below found that no "promise" had been made to petitioner (page 3 of Opinion) it did indicate that an informal agreement had been reached whereby if petitioner was accepted as a witness, he would not be prosecuted for perjury (page 2 of Opinion). It was after this agreement was made that petitioner again testified before the Federal Grand Jury, thereby giving the government conclusive evidence of his perjury.

The court below held that the second Grand Jury testimony resulted from "coercion established by law" (page 3 of Opinion). Its reasoning was that petitioner faced the possibility of prosecution for perjury when he testified falsely on September 14, 1967. Therefore, the court reasoned, his own act forced him to recant his previous testimony. Petitioner contends this holding is erroneous.

The government, in the instant case, accomplished two acts by making the informal agreement with petitioner. In the first place, they promised not to prosecute petitioner if he agreed to offer testimony which would not only lead to the conviction of the defendants in the lower case, but would also serve to incriminate himself. Secondly, and much more important, the government threatened to prosecute petitioner unless he took the stand and testified. In other words, the government forced petitioner to testify through the threat of penal sanction which could be validly invoked, thereby handing the government the evidence necessary to convict him of perjury.

There can be no doubt but that petitioner relied upon this agreement, and was thus coerced into giving the incriminating statement. This Honorable Court has consistently refused to allow the admission of evidence which was obtained by coercion. In Malloy v. Hogan, supra, the Court stated that,

> "(g)overnments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not be coercion prove a charge against an accused out of his own mouth." 390 U.S. at 8.

A close analogy to the instant case may be found in the Marchetti-Grosso-Haynes cases, cited above. As the basis factual situation in

the three cases is similar, it will not be necessary to discuss them all. In Marchetti, petitioner refused to file forms or pay the occupational tax upon wagering as required by statute. His argument was that if he had complied with the statute, the forms would be used as self-incriminating evidence against him in possible gambling prosecutions. The divulgence of this incriminating evidence, petitioner contended was mandatory, for failure to file the forms would lead to penal sanctions under the statute. This Court accepted petitioner's position. The Court held that the government could not use evidence of a self-incriminating nature if that individual, had been forced to divulge that evidence under the threat of a valid penal sanction.

Although the Marchetti case dealt with penal sanctions granted by statute, the basic holding of the case should have been applied to petitioner's situation in the instant case. In Marchetti the Court emphasized the fact that petitioner faced criminal prosecution if he failed to comply with the statute, and the possibility of a gambling prosecution with self-incriminatory evidence introduced if he did comply with the statute. The threat of penal sanctions, unless he divulged this information was held to be a violation of petitioner's privilege against self-incrimination. This is the situation in the instant case. Here petitioner was told by the government that, if he would not comply with their request, he would be prosecuted for perjury. If, however, petitioner did comply

with the request, he would be forced to give evidence of a self-incriminatory nature which could eventually be introduced against him.

Because of the fact that the privilege against self-incrimination is a fundamental right in this country and because the Court of Appeals has failed to adequately consider and apply these important cases, this decision calls for an exercise of the Court's supervisory power.

2. The Decision Below Conflicts with Decisions of Other Courts of Appeals as to Whether Advice of Counsel is a Defense to a Violation of Section 401, Title 18, United States Code.

In the case below, petitioner was granted immunity under Section 409(1), Title 47, United States Code. This section grants complete immunity from any penalty arising out of testimony he is compelled to give after claiming the privilege against self-incrimination. However, Section 409(1) specifically allows prosecution for perjury. Petitioner, relying in good faith upon advice of his counsel that he would not be immune from prosecution for perjury committed before the Federal Grand Jury, refused to give testimony, invoking his privilege against self-incrimination.

The issue here is one of fundamental constitutional rights. Petitioner did not refuse to give testimony because of a fear of implicating himself. Rather, the refusal was based upon the belief that any testimony at the trial would result in self-incriminating evidence which could be used against him for a prior, unconnected offense. This refusal was given because of petitioner's reliance upon advice of his counsel.

The Courts of Appeals of the various circuits are in conflict upon whether this reliance upon advice of counsel is a valid defense. In re Eskay, 3rd Cir., 1943, 122 F. 2d 819, stated, albeit in dictum, that reliance upon advice of counsel is a valid defense in a criminal contempt proceeding. This was supported by two cases, Matthews v. Spangenberg, CCSDNY, 1883, 15 Fed. 813, and Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 6th Cir., 1915, 230 Fed. 120. Those cases stated that a valid defense existed if there was a good faith reliance upon counsel's advice that refusal to comply was not a violation of a court order.

However, in Eustace v. Lynch, 9th Cir., 1935, 80 F. 2d 652, the court held that reliance upon advice of counsel was not a valid defense. In that case the attorney, in good faith, advised Mrs. Eustace that the receiver in a bankruptcy proceeding had no right to take possession of the property in question. Mrs. Eustace thereupon refused to surrender possession. A

criminal contempt proceeding followed. Although the court did not deal in depth with the reasons for this holding, it did state that the attorney was acting in good faith. Therefore, the only possible reason he could have had for advising his client not to surrender possession was that such a refusal would not be a violation of a court order. If such an interpretation is applied, then Eustace is in direct conflict with the above mentioned cases on this specific, important point of law.

In the instant case, the Court of Appeals has sanctioned the rule of Eustace, rejecting the rule applied in the Third and Sixth circuits. The only possible interpretation of this holding is that the refusal to testify was simply a violation of a court order. As explained above, this is not so. Rather, the refusal to testify was based, in good faith reliance, upon counsel's advice that a privilege against self-incrimination still existed.

Because of the importance of the constitutional issues involved, this decision calls for an exercise of this Court's power of supervision to eliminate the conflict among the circuits.

CONCLUSION

If this Honorable Court were to grant the requested writ of certiorari, then it would resolve an existing conflict dealing with an important point of law and would also further define the situations under which evidence of a self-incriminatory nature which had been obtained through force or coercion may be used in a federal criminal proceeding.

Respectfully submitted,

RICHARD G. SHERMAN

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 24,865

ALBERT B. SNYDER,

Defendant-Appellant.

[June 11, 1970]

Appeal from the United States District Court for the Southern District of California

Before: DUNIWAY, KILKENNY and TRASK, Circuit Judges DUNIWAY, Circuit Judge:

Snyder appeals from a judgment of conviction under nine counts of a ten-count indictment. Count one charged a violation of 18 U.S.C. §401, willful and knowing disobedience of a lawful court order. He

refused to testify as a witness in a federal case, after being granted immunity and ordered to testify. Counts two through ten each charged a violation of 18 U.S.C. §1621, perjury. Each count involved specific perjurious testimony before a federal grand jury. In a court trial, Snyder was found guilty on all counts except count nine.

Snyder does not attack the sufficiency of the evidence on any of the counts. He challenges the district court's failure to grant motions to suppress certain evidence and to dismiss the indictment. In addition he alleges that the judgment imposed violates the Fifth and Eighth Amendments to the Constitution.

THE FACTS

Snyder was one of many witnesses subpoenaed to appear before a federal grand jury which was investigating interstate activities involving cheating at cards at the Friars Club in Los Angeles. For background, see Gebhard v. United States, 9 Cir., 1970, 422 F. 2d 281. Snyder appeared before the grand jury on September 14, 1967, and repeatedly perjured himself. After Snyder testified, his attorney, one Bruce Hochman, called the Assistant United States Attorney, David Nissen. Nissen informed Hochman that Snyder had lied to the grand jury. Hochman said he would attempt to resolve the problem in order to spare Snyder from a perjury indictment. Nissen told Hochman, "that we needed

witnesses and would prefer to have Mr. Snyder as a truthful witness in the prospective 'Friars Club' case rather than as a defendant in such a case, or in a perjury prosecution." Hochman told Snyder "that if he told the truth and was accepted by the government as a witness that he would escape indictment." This was explained to Snyder as an informal but reliable procedure and not as a grant of immunity.

Snyder thereafter had talks with the F. B. I. and the United States Attorney, finally telling them what they believed to be the truth, and indicated his willingness to be a witness. He again testified before the grand jury on October 12, 1967. However, when he was subpoenaed to testify in cases evolving from the grand jury's investigation of the Friars Club, he fled the Los Angeles area. He was ultimately arrested in New Jersey and returned to Los Angeles. He refused to testify. Even after he was given a grant of immunity under 47 U. S. C. §409(1) he remained silent. He was then charged in the indictment in the present case.

SUPPRESSION OF EVIDENCE

It is Snyder's contention that the trial court erred in failing to grant his petition that all statements made by him to the F. B. I. after September 14, 1967 and all statements made before the grand jury on October 12, 1967 be suppressed. He argues that all statements

that he made after September 14, 1967 were "coerced" because they were made under threat of prosecution for perjury. He also argues that these statements were made in reliance on a promise that he would not be prosecuted for perjury and would not be required to appear as a witness in any trials.

After he testified falsely before the grand jury on September 14, Snyder certainly faced the possibility of a prosecution for perjury. This, however, was his own doing. Section 1621 is always a "threat" to those who choose to perjure themselves. Its purpose is at least two-fold. First, it is designed to forestall perjury, by reminding those who are called to testify that the oath that they take is not an idle formality. Second, by providing for punishment for those who violate the oath, it seeks to deter similar conduct by others. When a witness does what Snyder did, he makes himself liable to that punishment. This is a "coercion" established by law. When Snyder agreed to tell the truth, in the hope of escaping that punishment, he was not acting under the kind of coercion that the law condemns.

The record supports the trial court's implied finding that the "promise" that Snyder relies upon was not made. Moreover, if it had been made, the reason that it was not kept is that Snyder did not carry out his own promise to testify. He knew the terms of the bargain, if bargain there was. He cannot renege and then seek the protection of the courts so that he

may go scott free in spite of his own duplicity. It does not surprise us that Snyder is unable to cite authority in support of his remarkable proposition.

MOTION TO DISMISS THE INDICTMENT

Snyder argues that the indictment should have been dismissed as to the contempt charge because his refusal to testify was on the advice of counsel. The indictment charged an offense. A motion to dismiss is not the proper way to raise a defense. Las Vegas Merchant Plumbers' Ass'n v. United States, 9 Cir., 1954, 210 F. 2d 732, 741. Snyder took the stand "for the purpose of this motion only." He testified that he had refused to answer in the case mentioned in Count one on the advice of his counsel. He also gave other, contradictory, testimony. The court denied the motion without comment. The evidence supports, though it does not require, a finding that Snyder did not rely on advice of counsel. On that ground alone, the denial of the motion must be affirmed.

During the trial, not one word of evidence was offered in support of the advice of counsel defense. Technically, then, the question is not before us. However, because the matter was handled rather informally, there being no jury present, we consider the question on the assumption, first, that the question is before us, and second, that Snyder did rely upon his counsel's advice. Neverthless, such advice is no defense.

Eustace v. Lynch, 9 Cir., 1935, 80 F. 2d 652, 656. See also Taylor v. United States, 6 Cir., 1955, 221 F. 2d 809, 810; In Re Door, D. C. Cir., 1952, 195 F. 2d 766, 770, note 6; United States v. Goldfarb, 2 Cir., 1948, 167 F. 2d 735. Acceptance of the rule requested by Snyder would in effect do away with the the judicial grant of immunity because a witness given immunity could still avoid testifying if his attorney advised him to remain silent. We are not persuaded by the dictum in In Re Eskay, 3 Cir., 1943, 122 F. 2d 819, 822 n. 17, on which Snyder relies. The two cases there cited, Matthews v. Spangenberg, C. C. S. D. N. Y., 1883, 15 Fed. 843, and Proudfit Loose Leaf Co. v. Kalamazoo Loose Leafe Binder Co., 6 Cir., 1915, 230 Fed. 120, each involved good faith reliance upon counsel's advice that what the defendant did was not a violation of the court's order. Here, the advice, if given at all, was to disobey the court's order. We have held that in such a case the attorney is also in contempt. Leber v. United States, 9 Cir., 1909, 170 Fed. 881, 889-90; Anderson v. Comptois, 9 Cir., 1901, 109 Fed. 971; cf. In re Noyes, 9 Cir., 1902, 121 Fed. 209, 225 ff.

The second part of Snyder's motion to dismiss the indictment is related to the perjury counts, and is based on what Snyder calls the "basic inequity" of the situation. In support of his argument Snyder cites Saldana v. United States, 1961; 365 U. S. 646. In that case a defendant who had more or less been promised a five-year sentence by one judge was

given a twenty-year sentence by another. That is a far cry from this case. Here, the only "inequity" was in Snyder's own behavior. If he found himself between the Scylla of his obligations to the law and the Charybdis of his former associates he has no one to blame but himself.

VIOLATIONS OF THE 5th and 8th AMENDMENTS

Snyder argues that although he was apparently prosecuted for contempt and perjury, the government was actually prosecuting him for his failure to testify, and that therefore the judgment imposes double punishment for the same act, in violation of the Fifth Amendment, and imposes too long a sentence, in violation of the cruel and unusual punishment clause of the Eighth Amendment. To state the argument is to refute it. Snyder's punishment for contempt rests upon his refusal to testify; that punishment is six months imprisonment. His punishment for perjury, based upon eight separate charges, is four years imprisonment on each, concurrent -- an average of six months on each charge.

MOTION TO STRIKE

Snyder has moved to strike the government's brief on the ground that it states facts outside the record. In one instance it does. The statement occupies three lines in a ten page brief; it refers to testimony by Snyder

and his counsel in another case and was obviously provoked by extravagant and unsupported statements in Snyder's brief. We do not commend the government's foray into outer darkness, but we do not think that it warrants striking the brief.

Judgment affirmed; motion to strike denied.

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No. 537

In the Supreme Court of the United States

OCTOBER TERM, 1970

ALBERT B. SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 537

ALBERT B. SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Southern District of California, the petitioner was convicted on one count of disobeying a lawful court order directing him to testify pursuant to a grant of immunity (18 U.S.C. 401), and on eight counts of perjury (18 U.S.C. 1621). He was sentenced to concurrent terms of four years' imprisonment on the perjury counts and to a consecutive six-month prison term on the wilful disobedience count. The court of appeals affirmed the convictions on June 11, 1970. On July 13, 1970, an extension of time to file a petition for a writ of certiorari was granted to and including

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August 10, 1970. The petition, which was filed August 13, 1970, is out of time under Rule 22(2).

There is in any event no reason to grant the writ. Petitioner admits that his testimony before a federal grand jury in September, 1967 was false (Pet. 7). He attacks the perjury convictions on grounds that his testimony at a subsequent appearance before a federal grand jury should not have been admitted at trial because it was "coerced" by statements to his attorney by the assistant United States attorney that the government was more interested in truthful testimony from defendant than in a perjury case against him. As the court below observed, however, when petitioner agreed to tell the truth on a second occasion in the hope of escaping punishment caused by his own wrongdoing in falsely testifying in an earlier proceeding, "he was not acting under the kind of coercion that the law condemns" (Pet. App. A–4).

Petitioner also claims that the contempt conviction for refusing to testify after being granted immunity was invalid because he relied "in good faith upon advice of his counsel that he would not be immune from prosecution for perjury committed before the Federal Grand Jury." (Pet. 11). 47 U.S.C. 409(l) provides that no individual shall be prosecuted for any matter "concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment *for perjury committed in so testifying*" (emphasis supplied). The ad-

vice of counsel that petitioner would be subject to punishment if he committed perjury when he testified is hardly a defense to refusal to testify. The conflict petitioner sees among the circuits as to the advice of counsel defense is wholly chimerical. As the court below points out, in the cases relied on by petitioner, the defendant acted in good faith reliance upon counsel's advice that what he did was not a violation of the court's order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970